Patani Metal Sdn Bhd v Lt Cdr (B) G Thygarajah

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 25–17 OF 1999
ZALEHA ZAHARI J
14 DECEMBER 2000

Civil Procedure *— Action — Reinstatement of action — Judicial discretion of court to reinstate case — Whether action had been 'struck out' — Whether application for reinstatement the proper recourse*

Civil Procedure *— Adjournement — Application for — Discretion of court — Applicant's counsel unable to attend hearing due to engagement in another court — Refusal*

This case was fixed for hearing on 25 April 2000 and when it was called up, one Mr Leow stated that he was mentioning the case on behalf of both parties. The court was then informed that the applicant counsel had sought an adjournment on that date (encl 7), to which the court questioned him as to why the applicant was seeking 'leave to file an application to apply for certiorari' when leave had already been granted by the court on 25 February 2000. The case was then stood down to enable Mr Leow to get instructions from the applicant's counsel. When the case was recalled, Mr Leow informed the court that he was unable to explain why encl 7 was also for 'leave' and that he left it to the court's discretion to make any orders that the court deemed fit. The application was dismissed but no order as to costs was made against the applicant because the respondent had not, as of that date, filed any affidavit in reply. Thereafter, the applicant sought for an extension of time to file the application and for a further order that encl (7) which had been 'struck out' by the court on 25 April 2000 be reinstated for hearing. In the affidavit supporting this application, Mr Miranda (applicant's counsel) gave his reasons for being unable to attend the hearing and urged the court to give the applicant an opportunity for the case to be heard on its merits, prayed for an order in terms of the application and stated that any defects to the application was curable under O 53 r 3 of the Rules of the High Court 1980. Mr Shanmugam (respondent counsel) submitted that the only recourse opened to the applicant was to appeal and stated that the application as well as the supporting affidavit was inadequate for failure to disclose merits.

Held, dismissing the application with costs:

(1) In respect of the adjournment sought by the applicant's counsel on the ground that counsel is engaged in another court, the Chief Justice Circular KHN No 47 of 2000 dated 10 April 2000 is very clear on this point, ie, that no adjournment should be entertained by reason of counsel being engaged in another court, including that of the Federal Court (see p 245B–C).

(2) In view of the stand taken by this court that encl (7) was bad by reason of duplicity, the court was of the view that should the applicant be aggrieved by this decision, then the proper procedure for the applicant to follow was to appeal to the Court of Appeal, and not for reinstatement as, having made the order that the court did, the court had exhausted its jurisdiction, was functus officio, and no longer had the power to set aside the order issued (see p 245C–D).

[Bahasa Malaysia summary

Kes ini telah ditetapkan untuk perbicaraan pada 25 April 2000 dan apabila ia dipanggil, seorang Mr Leow menyatakan bahawa beliau menyebut kes tersebut bagi pihak kedua-dua pihak. Mahkamah kemudian telah dimaklumkan bahawa peguam pemohon telah memohon satu tangguhan pada tarikh tersebut (lampiran (7), di mana mahkamah menyoal beliau kenapa pemohon memohon 'kebenaran untuk memfailkan satu permohonan untuk memohon certiorari' walhal kebenaran telahpun diberikan oleh mahkamah pada 25 Februari 2000. Kes tersebut telah ditangguhkan sementara bagi membolehkan Mr Leow mendapatkan arahan daripada peguam pemohon. Apabila kes dipanggil semula, Mr Leow memaklumkan kepada mahakmah bahawa beliau tidak boleh menjelaskan kenapa lampiran (7) adalah juga untuk 'kebenaran' dan bahawa beliau menyerahkannya kepada budi bicara mahkamah untuk membuat apa-apa perintah yang mahkamah fikirkan patut. Permohonan tersbeut telah ditolak tetapi tiada perintah berkaitan kos telah dibuat terhadap pemohon kerana responden tidak, pada tarikh tersebut, memfailkan apa-apa afidavit balasan. Justeru itu, pemohon memhon satu lanjutan masa untuk memfailkan permohonan dan perintah selanjutnya bahawa lampiran (7) yang telah 'dibatalkan' oleh mahkamah pada 25 April 2000 dihidupkan semula untuk perbicaraan. Di dalam sfidavit yang menyokong permohonan tersebut, Mr Miranda (peguam pemohon) telah memberikan sebab-sebab kenapa beliau tidak dapat hadir untuk perbicaraan dan menegas agar mahkamah memberikan pemohon peluang untuk kes tersebut didengar atas merit-meritnya, memohon satu perintah seperti dikehendaki terhadap permohonan tersebut dan menyatakan bahawa apa-apa kecacatan kepada permohonan tersebut boleh diperbetulkan di bawah A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980. Mr Shanmugam (peguam responden) menghujahkan bahawa satu-satunya jalan yang ada untuk pemohon adalah membuat rayuan dan menyatakan bahawa permohonan dan juga afidavit sokongan tersebut adalah tidak mencukupi disebabkan kegagalan untuk mendedahkan merit-merit tersebut.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Berhbung dengan tangguhan yang dipohon oleh peguam pemohon atas alasan bahawa peguam tersebut menghadiri

mahkamah lain, Pekeliling Peguam Negara KHN No 47 tahun 2000 bertarikh 10 April 2000 adalah amat jelas tentang perkara ini, iaitu, tiada tangguhan patut dilayan atas sebab peguam menghadiri mahkamah lain, termasuklah Mahkamah Persekutuan (lihat ms 245B–C).

(2) Berdasarkan pendirian mahkamah ini bahawa lampiran (7) adalah tidak baik atas sebab penggandaan, mahkamah berpandangan bahawa sekiranya pemohon terkilan dengan keputusan ini, maka prosedur yang betul untuk pemohon ikuti adalah untuk membuat rayuan kepada Mahkamah Rayuan, dan bukan untuk menghidupkan semula kes kerana setelah membuat perintah yang mahkamah telahpun buat, mahkamah telah menggunakan bidang kuasanya dengan sepenuhnya, adalah functus officio, dan tidak lagi mempunyai kuasa untuk mengenepikan perintah yang dikeluarkan (lihat ms 245C–D).]

Notes

For cases on action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 31–129.

For cases on adjournment, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 130–139.

Cases referred to

Adzmi bin Ali & Anor v Mohamed Isa bin Kasal [1987] 2 MLJ 199 (refd)

Chuah Cheng Wan v Chuah Thiam Siew & Ors [2000] 1 CLJ 433 (refd)

Government of Malaysia v Sim Soe Hoe [1990] 1 MLJ 379 (refd)

Mohamad Nazri Ali v Abdullah Sidek [2000] 2 CLJ 744 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 67

Rules of the High Court 1980 O 53 r 3

Peter Miranda (*Peter Miranda & Co*) for the applicant.

N Shanmugam (*Shan & Gooi*) for the respondent.

Zaleha Zahari J. :

On 26 September 2000, I dismissed the notice of motion filed on 24 May 2000 by Patani Metal Sdn Bhd ('the applicant') by which application the applicant sought for an extension of time to file this application and for a further order that encl (7) which had been 'struck out' by the court on 25 April 2000 be reinstated for hearing .The application is supported by the affidavit of the applicant's counsel, Mr Peter a/l VA Miranda, affirmed on 23 May 2000.

It is first and foremost necessary to place on record that the order made by this court in respect of encl (7) on 25 April 2000 was not a 'striking out' order as contended in the applicant's application in encl (12). The order made by this court on 25 April 2000 was that encl (7) was 'dismissed with no order as to costs'.

What transpired on that date was as follows: This case was fixed for hearing on 25 April 2000. When the case was called, one Mr Leow stood up and stated that he was mentioning the case on behalf of both parties, the applicant's, as well as the respondent's counsel. The court was informed that the applicant counsel had sought an adjournment on that date. The court then questioned him as to the reason why the applicant was again seeking for 'leave to file an application to apply for certiorari' when leave had already been granted by the court on 25 February 2000? The court then stood the case down to enable Mr Leow to get instructions from the applicant's counsel.

When the case was recalled, Mr Leow informed the court that he was leaving it to the court to make whatever order the court deemed fit, that he was unable to explain why the application in encl (7) was also for 'leave' to file an application for certiorari. It was in this circumstance that the court dismissed encl (7), but in the exercise of its discretion, made no order as to costs against the applicant by reason of the fact that the respondent had not, as of that date, filed any affidavit in reply.

In the affidavit filed in support of the application, Mr Miranda averred that as he was unable to be present in court on the date of hearing of encl (7) on 25 April 2000 by reason of the fact that he had to attend to a hearing at the Kangar High Court in respect of Bankruptcy No 29–170–99, he had applied for an adjournment vide letter dated 14 April 2000. According to him, the first respondent's counsel had no objection to the adjournment sought by him. He further averred to having been diagnosed as suffering from food poisoning and having abdominal cramps and diarrhoea on that material date in question and he was therefore also unable to attend the Kangar High Court proceedings on 25 April 2000.

Mr Miranda urged the court to give the applicant an opportunity for the case to be heard on its merits. He was of the view that any defects, if any, to the application was curable under O 53 r 3 of the Rules of the High Court 1980 and prayed for an order in terms of the application. On the necessity to show merits, according to him, this issue was already before the court.

In reply, Mr Shanmugam submitted that encl (12) was irregular as the applicant did not seek to set aside the court order dated 25 April 2000 but merely sought for reinstatement of encl (2). He was of the view that if the applicant was unhappy with the court's decision of 25 April 2000 then s 67 of the Courts of Judicature Act 1964 would apply. The only recourse open for the applicant in this situation was to appeal, and not to apply for reinstatement. He further submitted that the application, as well as the supporting affidavit, was inadequate for failure to disclose merits. Reference was then made to the cases of *Mohamad Nazri Ali v Abdullah Sidek* [2000] 2 CLJ 744, *Chuah Cheng Wan v Chuah Thiam Siew & Ors* [2000] 1 CLJ

433, *Adzmi bin Ali & Anor v Mohamed Isa bin Kasal* [1987] 2 MLJ 199 and the case of *Government of Malaysia v Sim Soe Hoe* [1990] 1 MLJ 379 in support of these propositions.

As stated earlier, the order of the court issued on 25 April 2000 was not an 'in default' order by reason of the applicant counsel's absence, but upon consideration of the application in encl (7) as formulated which was before the court. The court took the view that no useful purpose would be served by adjourning the case to another date.

In respect of the adjournment sought by the applicant's counsel on the ground that counsel is engaged in another court, the Chief Justice Circular KHN No 47 of 2000 dated 10 April 2000 is very clear on this point, ie that no adjournment should be entertained by reason of counsel being engaged in another court, including that of the Federal Court.

In view of the stand taken by this court that encl (7) was bad by reason of duplicity, I am in agreement with Mr Shanmugam's submission that should the applicant be aggrieved by this decision, then the proper procedure for the applicant to follow was to appeal to the Court of Appeal, and not for reinstatement as, having made the order that I did, I had exhausted my jurisdiction, was functus officio, and no longer had the power to set aside the order issued.

In these circumstances encl (12) was then dismissed with costs.

Application dismissed with costs.

Reported by Chew Phye Ken